

WALDEMAR HOFF¹

Korematsu. Too Early for the Court of History

Abstract

In 1942 the American military authorities interned over 120 thousand persons of Japanese ancestry in fear of sabotage on behalf of Japan. In a landmark 1944 case the Supreme Court rehabilitated Fred Korematsu but upheld constitutionality of the wartime laws leading to the internment. As transpired later, there was no evidence of the Japanese-Americans' forming a fifth-column. The court decision was criticized as unconstitutional and driven by racism. In view of the dissenting judges and commentators it was condemned by the court of history. This article claims that the original decision was justified by the circumstances of the war, including the uncertainties it brought with it. Unless we equip the government with the power of clairvoyance, it has to be able to act, and even err, in emergency. The debate around Korematsu ignored the previous experience of both World Wars in which German fifth columns were active and effective. One such eyewitness account, not known in Western literature, is presented in the article. Modern history confirms that the fifth column as such is a timeless phenomenon. The fear of hybrid wars techniques, justified or not, has led to the reemergence of the fifth column legislation in XXI century, although the range legal instruments intended to contain it is different. It is too early for judges and scholars to speak authoritatively on behalf of the court of history, for history is still in the making.

Keywords: Korematsu, fifth column, sabotage, court of history, minorities, government powers, hybrid war

¹ Prof. Waldemar Hoff – Kozminski University; e-mail: waldhoff@kozminski.edu.pl; ORCID: 0000-0002-6929-9130.

WALDEMAR HOFF

Korematsu. Za wcześnie na sąd historii

Streszczenie

W 1942 r. amerykańskie władze wojskowe internowały przeszło 120 tys. osób pochodzenia japońskiego w obawie przed sabotażem na rzecz Japonii. W historycznym wyroku sąd uwolnił od zarzutów Freda Korematsu, lecz podtrzymał konstytucyjność ustawodawstwa prowadzącego do internowania. Później okazało się, że nie było dowodów na udział internowanych w formowaniu piątej kolumny. Decyzja ta była krytykowana jako niekonstytucyjna i motywowana rasizmem. Zdaniem sędziów, którzy zgłosili zdanie odrębne oraz komentatorów stanowisko sądu zostało potępione przez sąd historii. Autor twierdzi, że pierwotna decyzja SN była uzasadniona okolicznościami wojny, w tym stanem niepewności, który ze sobą niosła. Dopóki nie wyposażymy władz w dar jasnowidzenia, musimy uznać ich prawo do działania w czasie zagrożenia, nawet z marginesem błędu. Debata towarzysząca temu wyrokowi zignorowała doświadczenia obu wojen światowych, w których niemiecka piąta kolumna była aktywna i efektywna. Artykuł przedstawia, nieznaną w piśmiennictwie zachodnim, opowieść naoczego świadka niemieckiego sabotażu w czasie pierwszej wojny światowej. Współczesna historia potwierdza ponadczasowość zjawiska piątej kolumny. Strach, uzasadniony lub nie, przed technikami wojny hybrydowej doprowadził do odradzania się ustawodawstwa skierowanego przeciw piątym kolumnom w XXI w., choć środki ich zwalczania są inne. Jest zbyt wcześnie na autorytatywne wypowiedzi sędziów i akademików w imieniu „sądu historii”, ponieważ do końca historii jeszcze daleko.

Słowa kluczowe: Korematsu, piąta kolumna, sabotaż, sąd historii, mniejszości, kompetencje rządu, wojna hybrydowa

Introduction

In 1942 over 120 000 persons of Japanese ancestry, including 70 thousand American citizens, were relocated to internment zones designated by the military authorities. The move was driven by fear that the minority members could serve the interest of the Japanese Empire that had destroyed the port of Pearl Harbor without declaring war. One of those affected by the wartime law was Mr. Korematsu who, in defiance of the military order, continued to live close to his family home instead in a designated camp. He went to great lengths to camouflage himself by changing his name and underwent plastic surgery to remain close to his white girlfriend. He also altered his draft card to fit his new identity.² He was caught and sentenced for violating military orders, upon which he allowed the American Civil Liberties Union to represent him in a lawsuit against the military authorities. The lawsuit alleged both illegality of the sentence and unconstitutionality of the law on which the military orders were based. In 1944 the Supreme Court upheld the decision of the military authorities as far as it concerned the right of the government to institute measures such as curfews and isolation based on the criterion of race. However, the dissenting judges questioned both the constitutionality of the detention and the probability of sabotage coming from the Japanese minority.³ They accused the authorities, and indirectly the majority of the judges, of racism, despite the fact the latter frontally renounced racial motives and invoked national security concerns in the face of “clear and present danger”.⁴ Also, the dissenters insisted on calling the designated zones – “concentration camps”.⁵ And, in *Trump v. Hawaii* justice Roberts, citing Robert A. Jackson’s 1944 dissent, stated pompously that Korematsu “has been overruled in the court of history.”⁶ Most commentators followed the suit.⁷

² D.M. Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, “UCLA Asian Pacific American Law Journal” 1996, 4, p. 98.

³ *Fred Korematsu v. United States* 323 U.S. 214 (1944).

⁴ D.M. Hashimoto, *op. cit.*, p. 120.

⁵ *Ibidem*, p. 75.

⁶ *Trump v. Hawaii*, IV, D, p. 38.

⁷ E.g. Laurence Tribe of Harvard Law School, see D.A. Harris, *On the Contemporary Meaning of Korematsu: Liberty Lies in the Hearts of Men and Women*, “Missouri Law Review” 2011, 76, p. 8.

In 1983, as a result of mass public protests, the case was reopened. The right to limit freedom on the basis of ethnicity was upheld under the strictly interpreted circumstances of the war, although Mr. Korematsu himself was rehabilitated (despite breaking the law that the court found constitutional). Thousands of Japanese-Americans were paid compensation for no proof of their participation in a fifth column had been found. Even if some five thousand of Japanese-Americans “refused to swear the unqualified allegiance to the United States and renounce allegiance to the Japanese Emperor”, their refusal was interpreted as a protest against the conditions of the internment and avoid military service.⁸ Similarly high expectations as to the standard of evidence of participation in the fifth column were expressed in Asian fifth column cases.⁹ In 1988 president Clinton bestowed the Medal Of Freedom on Fred Korematsu.¹⁰ The same year Congress apologized on behalf of the nation.¹¹ Some authors admit that the media and the court victory was based on political force – by mobilization of organizations such as the Japanese-American Citizens League, groups and individuals, in schools and union halls and in the media for “political power was the strongest antidote” to discrimination of minorities.¹² One of the most vocal critics of Korematsu, professor Rostow admitted that “The case has been overruled because of the criticism it received.”¹³ Nevertheless, the original Korematsu decision was still valid and occasionally invoked under the *stare decisis* doctrine.

The case resurfaced again in 2018 in *Trump v. Hawaii* in which the Supreme Court distanced itself from the original 1944 decision. This decision tends to be interpreted as discarding Korematsu altogether, both for lack of constitutional grounds for the internment and racial intentions of the US government visible in the inflammatory language of general DeWitt Report and manipulating facts which inspired reservations as to the accuracy of his report.¹⁴ Most legal writing on the subject have deplored the wartime decision as based on insufficient evidence and tainted by racism, despite the original court declaration to apply the highest level

⁸ D.M. Hashimoto, *op. cit.*, p.107–108.

⁹ R. Loeffel, *The Fifth Column in World War II, Suspected Subversives in the Pacific War and Australia*, Palgrave Macmillan 2015, p. 6.

¹⁰ H.G. Cohen, “Undead” Wartime Cases: *Stare Decisis and the Lessons of History*, “Tulane Law Review” 2010, 84, p. 1014.

¹¹ D.A. Harris, *op. cit.*, pp. 10–11.

¹² S.K. Serrano, D. Minami, *Korematsu v. United States: A „Constant Caution” in a Time of Crisis*, “Asian Law Journal” 2003, 10, p. 49.

¹³ E. Lin, *Korematsu Continued...*, “Yale Law Journal” 2003, 112, p. 1912.

¹⁴ D.M. Hashimoto, *op. cit.*, p. 106.

of scrutiny indispensable when a specific ethnic group is being singled out.¹⁵ It has been presented as a warning for the future generations.¹⁶

Thesis

This article claims that, first, while it is true that political powers may, and often do use ethnic scare for their own murky purposes it may also happen that ethnic (or ideological) groups may be rationally suspect of espionage and sabotage. Example of fifth columns abounded particularly before and during World Wars I and II, some of which are described below. The problem is timeless – it was known in the antiquity, like in the Peloponnesian wars, although then not necessarily in strictly ethnic terms.¹⁷ Millennia later ethnic and ideological criteria have met in the Spanish Civil War when the Soviet Union communists assisted Spanish communist in fighting their right-wing opponents.¹⁸

In some countries, like in Australia (see below) brand new laws tackle the issue of the possible fifth columns in all spheres of life – a product of global rivalry of great powers frequently defining themselves, and being defined, in civilizational and ethnic terms. Ignoring the historical experience gathered from earlier and contemporary political and military conflicts renders the dissenting voices in Korematsu and later criticism uninformed and even parochial. It also cast an unfavorable light on the legal competences of governmental departments, for the proof of fifth columns in Europe was easily available at that time. Even more so, being so often quoted in the news it had to be common knowledge. The existence of the fifth column as such would not automatically prove that the Japanese minority formed one, but it would support the government's concern that while most Japanese-Americans remained loyal to the United States, it was not certain at the time of making the decision in question. Neither was it certain that they could not form it in the future the way Germans had in Europe.

Second, it is naïve to expect governmental decisions to be infallible, particularly while being at war when the survival of the nation is at stake. It is unrealistic to provide evidence of espionage and sabotage which by their nature are intended

¹⁵ The accusations of racism appeared in three dissenting voices, see S.K. Serrano, D. Minami, op. cit., p. 41. They are also common in academic journals, e.g. E. Lin, op. cit., p. 1918.

¹⁶ Judge Patel's opinion expressed *Korematsu v. United States*, 584 F. Supp 1406, 1420, N.D. Cal. 1984 commented by Susan Kiyomi Serrano, Dale Minami, op. cit., pp. 11–14.

¹⁷ L.A. Losada, *The Fifth Column in the Peloponnesian War*, Mnemosyne 2018, p. 45 et seq.

¹⁸ N. Valis, *Hemingway's The Fifth Column, Fifthcolumnism, and the Spanish Civil War*, "The Hemingway Review" 2008, 28, p. 4.

to be secretive and undetected by the enemy. In protecting national security one should rely on probability rather than certainty in the assessment of possible dangers, for terrorist and saboteurs seldom inform the authorities of their intentions by registered mail. If there is a lesson for modernity it is this: At the time of supersonic weapons of mass destruction time *is* of the essence which may lead to an exaggerated response by the authorities to be assessed later when the threat has been contained. The fact that Korematsu was decided at the time of conventional war lessens its moral importance for today conflicts.

Third, one has to separate the right of the government to act, from the actual harm done to individuals or groups, a byproduct of harsh wartime measures. The fact that retroactively majority of the Japanese-Americans deserved rehabilitation of their good name along with monetary compensation, should not invalidate government's powers to curtail civil rights at the time of war in whatever way which seems effective. Most certainly it is not for the judges to size the threat and paralyze the defensive capabilities of the nation.

The mistake of ahistoricism

Korematsu and other "wartime cases"¹⁹ found the actions of the military justifiable in the light of the imminent danger that was defined broadly. Both in 1944 and later courts held the internment decision constitutional "as of the time it was made." The time at which it was made was the time of war, and, as Justice Charles Evans Hughes famously put it "the power to wage war is the power to wage war successfully."²⁰ This was a product of a "fighting" and "marching" constitution. "That is, there are constantly new applications of unchanged powers".²¹ Therefore these powers should be interpreted expansively and flexibly.²² Unfortunately, this crucial aspect was omitted both on purpose and out of ignorance about history. The authorities, courts and critics of the decision made no references to the experience of other countries in WWI and WWII that would make the case much better understood.

Critics smoothly go over the fact that Japanese-Americans affected by the wartime laws had full procedural rights to seek redress in court. This by itself has

¹⁹ S.K. Serrano, D. Minami, op. cit., pp. 40–42.

²⁰ Ch.E. Hughes, *War Powers Under the Constitution*, "Marquette Law Review" 1917, 2, p. 9, pp. 615–616, 628.

²¹ Ibidem, p. 18.

²² M.C. Waxman, *The Power to Wage War Successfully*, "Columbia Law School, Scholarship Archive" 2017, 117, p. 628.

proved that the rule of law was working even in the face of possible annihilation by the enemy. Nothing even remotely similar would be possible in Japan or Germany or fascist Italy. In this light the comparison of designated zones to concentration camps strikes as not only uninformed but also unfair and irresponsible. It also casts doubt on the wisdom of indoctrinating law students with the notion that wartime court decisions were “the embarrassment”.²³

Also, accusation of racism were tossed about too lightly by judges and scholars. Some of it may have resulted from plain unfairness and some, again, from ignorance about history. Contrary to some voices, “contextualization” – setting the case in its times – is a necessary ingredient of a fair judgment, not the other way around.²⁴ Part of that contextualization should involve stepping in the shoes of people threatened by annihilation at the time of war. Would it be racist on the part of Jews to resent Germans in 1942? Or, would it be racist on the part of Poles to resent the Germans who killed millions of Poles and burned down their country? Would Jews really want a “constructive discourse” with the Germans after the *Cristal Nacht* and afterwards?²⁵ The same questions could be asked the Asian victims of Japanese cruelty in WWII. The Japanese let themselves to be known of utmost cruelty in China, Indonesia, and other parts of Asia matching the atrocities committed by Nazi Germany in Europe. These facts are extremely important because they are consistently downplayed by commentators who, decades later, saw the internment of the Japanese minority through the lenses of peaceful modernity. As justice Black once put it, “Heightened racial antagonism is an inevitable consequence of warfare between people of different racial characteristics”.²⁶ As he proclaimed in majority opinion “we cannot avail ourselves of the calm perspective of hindsight – now say that at the time these actions were unjustified.”²⁷

Mieczysław Jałowiecki – an eyewitness account

History books provide many examples of the fifth column within the last hundred years. The fifth column in Poland and Norway are some of the most prominent

²³ A.M. Tyler, *Courts and the Executive in Wartime: A Comparative Study of American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today*, “California Law Review” 2019, 107, p. 865.

²⁴ Contextualization was derided by D.M. Hashimoto, op. cit., p. 82.

²⁵ By idem, op. cit., p. 127.

²⁶ T.E. Yarbrough, *Mr. Justice Black and His Critics*, Durham, NC 1988, p. 234.

²⁷ *Ibidem*.

examples. They were sufficiently documented and analyzed therefore there is no need to present them here.²⁸ From time to time, however, new evidence comes to the surface. One of them are M. Jałowiecki's memoirs *At the Edge of Empire and Other Memories* available so far only in the Polish language.²⁹ His account span two epochs – the turbulent time in imperial Russia before and during World War I and the interwar period in Poland. The author was a Polish nobleman whose lineage reached back to the Rurik dynasty ruling Russia in the early middle ages. His father was in charge of a company building railway equipment for the Russian empire. Because of his birth and family connections, he was made a *kamerjunker* (a titular courtier to the tsar). He became privy to the many secrets of the imperial family and to the horrors of the brewing revolution. He met such historical figures as the last emperor and his aloof wife, Rasputin, Nobel brothers and a ruthless revolutionary Feliks Dzierżyński.

From the point of view of this article the most important is his account of solidarity of Russian Germans with the homeland of their ancestors. The memoirs create a dramatic eyewitness account of sabotage committed by the fifth column of Germans and Russian-Germans living in Russia. There are also more subtle manifestations of serving the foreign master in a more diluted form of loyalty: admiration or conviction of his cultural superiority. There is no doubt that such sentiments played a crucial role in making actual political choices. It becomes more clear when Jałowiecki is delegated to the Russian Embassy in Germany. As an expert in agriculture he was sent to Berlin at a time when Russia negotiated a trade agreement with the Imperial Germany. The openness of the German market to the Russian goods might hinge on his opinion on the German agricultural market. On the first day of his mission he paid a visit to the Russian ambassador in Berlin baron Osten-Sacken. By Jałowiecki standards the very name was ominous for he believed, and had good reason for it, that the Germans in the service of the tsar exhibited anti-Russian sentiments. Judging from the names of the embassy employees there was just one native Russian in the employ of the tsar.³⁰ Later, when the war broke out, Jałowiecki repeated that people bearing German names should not be put in charge if the Russian army.³¹ Such prejudice as to the name may seem absurd and unaccep-

²⁸ E.g. L. De Jong, *The German Fifth Column in World War II*, Chicago 1956, hardcover 308 pages; R. Loeffel, op. cit., 219 pages; A. Rohde (ed.), *The German Fifth Column in Poland*, Dale Street Books 2014, 134 pages.

²⁹ M. Jałowiecki, *Na skraju imperium i inne wspomnienia*, Warszawa 2015, 774 pages. Title translated into English by W. Hoff.

³⁰ *Ibidem*, pp. 76–90.

³¹ Jałowiecki meant general Pawel von Rennenkampf commander of the First Russian Army that suffered heavy losses in human lives, *ibidem*, pp. 208–209. However, other sources say that Ren-

table in 21. century, but one has to remember the historical content. During World War banners displayed before the Buckingham palace declared “No Germans, naturalized or not” which alluded to the German roots of the British Royal Family.³² In conversation with Jałowiecki the Russian ambassador talked lengthily about the backwardness of Russia and the German mission to civilize it. Jałowiecki was surprised not so much by the criticism but by the contempt he sensed in the words of a man who was supposed to represent Russia.

More subtle forms of sabotage resembled a hybrid war – a political diversion by corrupting minds of Russian workers very similar to creating fake news by electronic means a century later. One of such war techniques Jałowiecki was able to observe, dressed in a worker uniform and cap, in a company of similarly dressed John B. Hall, a representative of the British Foreign Office. In such a disguise they had mixed with a crowd of workers to listen to revolutionary speeches, including one, delivered by a comrade from Germany, or maybe, as Jałowiecki noticed, pretending to come from Germany.³³ All speeches presented England as the enemy and projected an idyllic picture of humanity, once under control of the proletariat. As observed by J.B. Hill, the Germans were trying a new weapon: the politics of subversion.

Later Jałowiecki witnessed the more brutal side of the fifth column, whose operations were facilitated by the German origin of the imperial family, German roots of many of their courtiers and substantial part of the Russian bureaucracy of that time. Some of scenes suggest that an ethnic minority could play a destructive role without being steered from their countries of origin just like ‘lone wolfs’ in terrorist movements of today. Some acts of solidarity with the homeland seemed spontaneous. Author’s father had decided to manufacture speed locomotives made entirely of the local components, giving up the import of the more complicated parts from England and Germany. This initiative was met with opposition from the English, Scottish and German engineers employed in the factory. Apparently, they had at heart the good of their national economies, not that of their benefactor.

Squarely within the definition of the fifth column fall other examples provided by Jałowiecki. The first concerns a wealthy land owner of German descent, Mr.

nenkampf was caught by the revolutionaries and offered high position in the army with the task to counter German attack in the area of the Don river. Upon refusal he was executed in March 1918. However, there is no agreement as to his intentions. Some sources exclude corruption or treason behind his failures as a general, see <http://deduhova.ru/statesman/pavel-karlovich-fon-rennenkampf/> (access: 15.09.2019).

³² Which led to adoption of the name Windsor in place of Sachsen-Coburg-Gotha in 1917 by George V and his successors.

³³ M. Jałowiecki, *op. cit.*, pp. 274–275.

Hasbach, who cultivate land consisting of former marshes with whom the author worked in a bank (one of his many functions). On one occasion he visited his vast agricultural estate located in the western peripheries of the Russian empire populated by many nobles of German descent. His fields, cultivated with utmost care were divided into large squares by stripes of concrete roads. Each quarter contained a large concrete square the size of a football field, which inspired Jałowicki's suspicion, particularly that a Russian fortress could be seen in a distance. But Mr. Hasbach rushed with the explanation that on the marshes such infrastructure made a good investment as it facilitated both transportation and storage of grain. He assured Jałowicki, that as a Russian citizen he had no reason to act against his country. Doubts remained as the tremendous cost of such structure seemed to exceed potential profits. And, indeed, within one month from the eruption of World War I the newspaper "Novoye Vremia" [New Times] noted in an article titled "Mr. Hasbach's way of cultivating grasslands" that "owing to the previously constructed concrete platforms the German artillery has destroyed the fortress within several hours."³⁴ There were other signs the German inhabitants of Russia were somehow prepared to the inevitability of war. Banks were flooded with requests for sizable loans against German property to be used as a collateral, the real estate market brimmed with offers of German estates at a fraction of its value, and, as observed by one railway station manager, unseen crowds of Germans were heading towards the Reich as if in the expectation of something to happen.³⁵ Apparently Russian Germans were well informed of the intentions of the Kaiser.

The most dangerous episode reported in the memoirs had to do with the closest circle of the tsarina. Jałowicki had heard from the highly placed people that the Germans almost openly penetrated Russia using persons highly positioned in the army, administration, and in the court. For instance, a group of officers had caught a Livonian baron on using army maps with details of military operations and sending at night light signals through the window.³⁶ Another spy was placed even higher. It was countess Kleinmichel, a lady-in-waiting to the empress. It may come as a surprise that treason could be committed by a lady, herself of Russian origin, whose husband's family of German descent, occupied high positions in the state apparatus of Russia for most of the 19. century. However, according to Jałowicki in Russia "even Russian having a drop of German blood would always give preference to their Germanness."³⁷ Her family has maintained cordial relationships

³⁴ Ibidem, pp. 202–203.

³⁵ Ibidem, pp. 200, 205.

³⁶ Ibidem, pp. 224–225.

³⁷ Ibidem, pp. 220. Translation by W. Hoff.

with German royal and ducal courts before and after the unification of Germany in 1871. As for the countess, Jałowiecki had been warned by a British diplomat that German submarines were spotted in the Finland Bay sending light signals to someone onshore. The suspect was countess Kleinmichel who owned a seafront villa. Both men made a reconnaissance under the pretext of doing business with her gardener, to come back again under the cover of the night. The lights went off in the house, and after not a long time, in the darkness, the door to the terrace opened, lamps in different colors were put on the railing. Soon, there was a response from the submarine by lights in the same colors. Within an hour a boat emerged from the darkness. Several men in German uniforms jumped onshore and disappeared in the villa.³⁸

Fifth column laws today

The issue of real, possible or imaginary fifth columns keeps resurfacing. Laws allowing detention of larger groups still exists ranking from U.N. Security Council Resolution (Kosovo conflict), through constitutional provisions (India) or ordinary legislation (Israel).³⁹ Unlike Korematsu case they were immersed in a different legal culture dominated by human rights and human rights rhetoric, the letter unwaveringly condemning detention as such. There are voices however, that, with the exception of Europe, detentions are consistent with the international human rights laws.⁴⁰ Some scholars claim that administrative detention has some advantages over criminal and wartime detentions: “the administrative detention may strike the most appropriate balance between liberty and security for certain categories of terrorism detainees.”⁴¹

More recently in connection with the alleged security threat coming from Muslim arrivals into the United States, Europe and elsewhere. The measure of reality of the issue is the wave of “anti-Sharia legislation” that swept through the USA and Canada – broadly contested in academic and mainstream media.⁴² As recently as

³⁸ Ibidem, pp. 283–286.

³⁹ A.S. Deaks, *Administrative Detention in Armed Conflict*, “Case Western Reserve Journal of International Law”, 2009, 40, pp. 415 et seq.

⁴⁰ D. Cassel, *International Human Rights Law and Security Detention*, “Case Western Reserve Journal of International Law” 2009, 40, p. 385.

⁴¹ M. Hakimi, *International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict Criminal Divide*, “Case Western Reserve Journal of International Law” 2009, 40, p. 649.

⁴² R. Johnson, *A Monolithic Threat: The Anti-Sharia Movement and America’s Counter Subversive Tradition*, “Washington & Lee Journal of Civil Rights and Social Justice” 2012, pp. 193–198.

in 2018 in *Trump v. Hawaii* Chief Justice John Roberts speaking for the majority addressed ethnicity issue in the context of national security.⁴³ Like at the time of *Korematsu*, the problem lies in the inability of vetting suspect terrorist from millions of immigrants forming their cultural, religious or ethnic background. The difference is that in *Korematsu* the suspect groups were already in the territory of the United States, while in *Trump v. Hawaii* they were aspiring visitors with no citizen status.

In the latter case the Court rejected an automatic connection between limiting entry right for individuals from certain countries – and racism. It means that certain measures do have as their objective security and not discrimination of selected ethnic groups even if such groups suffer more administrative restrictions than other groups. While it is true that governments can cast false accusations against minority groups for whatever reason (racism, raising hysteria, the *divide et impera* tactics), it is also true that from time to time diasporas and minorities of various shapes were used in international power struggle. Therefore the problems raised in *Korematsu* are not an anachronism despite factual and procedural mistakes made by authorities and courts, including by the dissenting judges who displayed ignorance of history.⁴⁴ Concerns over ethnic solidarity may continue to bear effect on international relations in a similar way that the ideological, or economic solidarities do. Regardless of whether accusations are justified at a given point of history the emergence of third-column laws becomes one of the characteristics of law in the XXI century and therefore deserves a less emotional approach by the academic community.

Contrary to the one-sided views of those who think they own the court of history, the problem may not just “us” but also “them”. It is enough to quote Osama Bin Laden who said the following words for ABC in 1998: “They are all targets... every day...they will receive a new corpse”.⁴⁵ Even if response to such threats seems exaggerated to some scholars, people have the right to expect that perceived threats are addressed by national legislation.

The contemporary fifth-column legislation seldom tackles the issue frontally like in the 1942 America. More likely it takes the form of restrictions on the freedom of doing business, employment (e.g. in airports) or ethnic profiling.⁴⁶ The terrorist

⁴³ *Trump v. Hawaii*, No. 17-965, 585 U.S. (2018), D, p. 34.

⁴⁴ D.M. Hashimoto, *op. cit.*, p. 84

⁴⁵ E. Baker, *Flying While Arab – Racial Profiling and Air Travel Security*, “*Journal of Air Law and Commerce*” 2002, 67(4), p. 1404.

⁴⁶ Described e.g. by Ch.A. Chandrasekhar, *Flying While Brown: Federal Civil Rights Remedies to post 9/11 Airline Racial Profiling of South Asians*, “*Asian Law Journal*” 2003,10, p. 217 et seq.

attack of September 11 repaved the way for profiling as a factor in national security.⁴⁷ What American military has done with the Japanese in 1942 was a technically antiquated and a more brutal version of racial profiling than one we are witnessing in the 21. century. Tying threats to ethnicity may take the form of mass surveillance and big data analysis in which private companies are no less adept than governmental security agencies.

One such legislative initiative stuck half-way between the frontal attack approach and a piecemeal approach is the new Australian legislation aimed at foreign influence against sovereignty. Like legislation that gave rise to the Korematsu syndrome, the Foreign Influence Transparency Scheme Act of 2018 (FITS) does not name any specific nationality, although commentators have no doubt that its edge is aimed at the Chinese nationals in Australia allegedly serving as a fifth column. Like in the case of Korematsu, accusations of racism, Sinophobia, cold war mentality and hysteria abound although the same writers admit one of the reasons may be “an unapologetically assertive China”.⁴⁸ Unlike in the case of Korematsu, the Act was issued for the time of peace with no horrors of war in the background. The possibility of an imminent military onslaught is not in the picture. Unlike the American law, the Australian law provides very soft limitations on individual freedoms.

As proclaimed in the Explanatory Memorandum, the new legislative measures pursue a legitimate objective (transparency) with which the measures are rationally connected and meet the criteria of reasonableness, necessity and proportionality.⁴⁹ Individuals and institutions communicating or dealing with foreign principals must report such facts to the secretary of state. A foreign principal is defined broadly to include not only governments but also i.a. enterprises whose capital is controlled by foreign governments in excess of 15% or individuals “related” to foreign governments. The notion of influence includes affecting “in any way” but is further broken down by two components – “acting on behalf” of foreign principal and “political or governmental influence”. Acting on behalf denotes acting under any arrangement with a foreign principal, acting on its orders or direction, or being in the service of, regardless of the existence of a payable consideration. To create a link it is enough that one of the parties knew or expected that the person would or might undertake the activity relevant to exerting influence. The second component encompasses

⁴⁷ E. Baker, op. cit., p. 1377.

⁴⁸ E.g. J.-Y. Lo, *Chinese Australians Are Not a Fifth Column*, “Foreign Policy” 31.05.2018, <https://foreign-policy.com/2019/05/31/chinese-australians-are-not-a-fifth-column-china-ccp-australia-morrison-turnbull-espionage-foreign-interference/> (access: 10.08.2019).

⁴⁹ Item 13 of the memorandum, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6298 (access: 10.10.2019).

actions intent on affecting federal elections or designated vote or decisions made by the Parliament and governments as well as affecting political parties and political candidates.⁵⁰ Data covered by the Act are entered into a register run by the secretary. Some of them may be made public. Failure to report the above constitutes a criminal offence. Even if the Australian law does not provide for anything resembling internment, the hue and cry in the media matches that following Korematsu. The debate in the media is heated, and, like in the United States devoid of historical references, excepting ones serving to suppress even thinking in the fifth column categories. Suppression is balanced by books like Clive Hamilton's *Silent Invasion* claiming that "The Chinese Communist Party (CCP) is engaged in systematic campaign to infiltrate, influence and control the most important institutions in Australia".⁵¹ The Race Discrimination Commissioner and academicians condemned the book as inciting racial hatred.⁵² Still, while condemning the hysteria surrounding the relationships between China and Australia, the Commissioner admits: "I am not in any way downplaying the seriousness of concerns that have been raised, both from inside and outside government, about foreign interference. They must be taken seriously. In our liberal democracy, there should – and there must – be debate about matters affecting the integrity of our democracy and the sovereignty of our nation-state."⁵³ His restraint in condemning the new legislation payed off in the light of the recent news concerning Wang Liqiang, a Chinese spy and saboteur in Hong Kong and Taiwan. Upon defection to Australia he revealed to the Australian security agency ASIO that China has been infiltrating many countries in the world, affecting some elections, kidnapping dissidents and critics, infiltrating students associations and attempting to plant its Trojan horse in the Australian Parliament.⁵⁴

It is likely that there will be more fifth column elements in national policies and legislation allowing for various forms of ethnic (or ideological) profiling. The trend will be magnified by interracial and international conflicts developing outside of the Old World. The fashionable talk of Asia becoming the economic and political

⁵⁰ Sections 10–12 of the Act.

⁵¹ C. Hamilton, *Silent Invasion: China's Influence in Australia*, Richmond, Vic 2018, p. 1.

⁵² T. Soutphommasane, *Beware Fanning Flames of racism over "Silent Invasion"*, "The Sydney Morning Herald" 28.02.2018, <https://www.smh.com.au/national/beware-fanning-flames-of-racism-over-silent-invasion-fears-20180228-p4z261.html> (access: 18.08.2019).

⁵³ *Ibidem*.

⁵⁴ I.e. B. Gertz, *China Stealing U.S. arms and military technology from Hong Kong: defector*, "The Washington Post" 3.12.2019, <https://www.washingtontimes.com/news/2019/dec/3/wang-liqiang-china-defector-australia-spills-commu/> (access: 4.12.2019); J. Smith, *Chinese Spy Story Stirs Australian Anxiety*, "Financial Times" 2.12.2019.

center of a globalized world and the growth of the Chinese “Civilizational state”⁵⁵ are likely to become a fertile ground of suspicions.

Excepting the post 8/11 legislation in the United States there is currently no specific fifth column law but atmosphere seems to be building up towards its creation in the future. One of such building blocks could be the statement made in 2018 by the FBI director before the Senate Intelligence Committee. He claimed that Chinese operatives, students and professors are infiltrating American universities.⁵⁶ Unsurprisingly, such a statement elicited a vehement response from the Chinese-Americans that reflected the sense of injustice and a suspicion of racism known from the voices of Japanese-Americans hurt by the WWII curtailment of their freedom.⁵⁷

However, situation is not as simple as the critics of fifth column legislation allege. It defies common sense to accept the existence of a hybrid war waged through the fake news, messing with national elections, or cyber sabotage, and, at the same, time deny credence to General Charles Dunlap’s concept of lawfare.⁵⁸ Lawfare techniques were broadly applied by persons accused of terrorism by attacking the enemy (the USA) on its own territory before its own courts. The world of terror resorts to the legal system of its enemy, particularly to its constitutional guaranties of freedoms and human rights. The very idea of lawfare and its various applications is vehemently denied and criticized by domestic commentators,⁵⁹ thus paradoxically, further empowering those who use it as weapon against their country.

Admittedly, the fifth column laws carry a serious danger of stigmatization some ethnic groups. There is no doubt that such practices are unacceptable outside of the context of war, and even at the time of war, if they project of ethnic bias. As Korematsu judges said, applying race related restrictions requires utmost caution. We have to look at the issue from the historical perspective. Were we to discuss the issue in 1944 Poland, or 1948 Israel, would be insensitive to stigmatize Germans as the perpetrators of the most atrocious crime in the history of humanity? What actually is sensitive, fair, or racist can be seen only when one includes its historical context.

⁵⁵ See Z. Weiwei, *The China wave. Rise of a Civilizational State*, World Century Publishing Corporation 2011.

⁵⁶ <https://www.scmp.com/news/world/united-states-canada/article/2133274/fbi-chief-says-chinese-operatives-have-infiltrated> (access: 15.02.2019).

⁵⁷ E.g. by Ch. Wang, *America’s Obsession with Chinese Spying is Hurting Innocent People*, <https://thediplomat.com/2019/07/americas-obsession-with-chinese-spying-is-hurting-innocent-people/> (access: 15.07.2019).

⁵⁸ The notion of lawfare see Ch.J. Dunlap Jr, *Does lawfare Need and Apologia?*, “Case Western Reserve Journal of International Law” 2010–2011, 43, pp. 121–125.

⁵⁹ L.N. Sadat, *On Legal Subterfuge and the So-Called “Lawfare” Debate*, “Case Western Reserve Journal of International Law” 2010–2011, 43, pp. 153–155.

The Korematsu case and the debate that followed was not only about race, discrimination and injustice. First and foremost it was about survival. Its lesson should include the issue of survival on the increasingly hostile international scene which denudes the fragility of Western political systems. We have to accept that certain decisions may be morally risky. They may be disproved later but they have to be taken based on the knowledge available at the time of their making. Inaction is not the option. Powers of the authorities responsible for national security must remain discretionary unless one can predict the development of events. Discretion entails the right to take the risk. No such power can be trusted with the judicial branch that has neither the knowledge nor experience necessary to make security decisions. Allowing excessive judicial interference puts at stake not only national security but also the constitutional division of powers. In balancing collective security and individual freedoms one should take into account the millennia of human experience.

Conclusions

The problem of linking group solidarity and national security exists objectively and independently of moral judgements. No amount of condemnation or denial is going to make it disappear. Less criticism and more curiosity is advised. We must not be gullible to the point of believing that nobody gets hurt in the process of providing security at the time of increasing brutality of international rivalry. We should work toward a legal framework capable to assuage the tensions as much as possible. "Then the weighing process must begin; a just balance must be struck... In striking this balance we must not forget that a sense of proportion is what separates us from the savages".⁶⁰

The Korematsu case has shown that understanding security needs is a process made of many layers unfolding one by one over a long period of time. One of such layers is modern history. It confirms that hybrid-war techniques known in antiquity are far from extinction. Just like it was premature to declare the end of history by F. Fukuyama, so it is too early for the court of history to say the last word.⁶¹ The obligation to govern inherent in Western constitutions means that the authorities have to take decision, including risky ones, based on available information, his-

⁶⁰ A.M. Dershowitz, *Preventive Confinement: A suggested Framework for Constitutional Analysis*, "Texas Law Review" 1973, 51, p. 1324.

⁶¹ F. Fukuyama, *The End of History?*, "The National Interest" 1989, 3, pp. 1–18. Fukuyama was contradicted by R. Kagan, *The return of History and the End of Dreams*, London 2008, pp. 3–5.

torical experience, and even on instinct. Otherwise we need further research into how to provide governments with the gift of clairvoyance.

Bibliography

- Baker E., *Flying While Arab – Racial Profiling and Air Travel Security*, “Journal of Air Law and Commerce” 2002, 4(67).
- Cassel D., *International Human Rights Law and Security Detention*, “Case Western Reserve Journal of International Law”, 2009, 40.
- Chandrasekhar Ch.A., *Flying While Brown: Federal Civil Rights Remedies to post 9/11 Airline Racial Profiling of South Asians*, “Asian Law Journal” 2003, 10.
- Cohen H.G., “Undead” *Wartime Cases: Stare Decisis and the Lessons of History*, “Tulane Law Review” 2010, 84.
- De Jong L., *The German Fifth Column in World War II*, Chicago 1956.
- Deaks A.S., *Administrative Detention in Armed Conflict*, “Case Western Reserve Journal of International Law” 2009, 30.
- Dershowitz A.M., *Preventive Confinement: A suggested Framework for Constitutional Analysis*, “Texas Law Review” 1973, 51.
- Dunlap Ch.J. Jr, *Does lawfare Need and Apologia?*, “Case Western Reserve Journal of International Law” 2010–2011, 43.
- Fukuyama F., *The End of History?*, “The National Interest” 1989, 3.
- Gertz B., *China Stealing U.S. arms and military technology from Hong Kong: defector*, The Washington Post 3.12.2019, <https://www.washingtontimes.com/news/2019/dec/3/wang-liqiang-china-defector-australia-spills-commu/> (access: 4.12.2019).
- Hakimi M., *International Standards for Detaining Terrorism Suspects: Moving beyond the Armed Conflict Criminal Divide*, “Case Western Reserve Journal of International Law” 2009, 40.
- Hamilton C., *Silent Invasion: China’s Influence in Australia*, Richmond, Vic 2018.
- Harris D.A., *On the Contemporary Meaning of Korematsu: Liberty Lies in the Hearts of Men and Women*, “Missouri Law Review” 2011, 76.
- Hashimoto D.M., *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, “UCLA Asian Pacific American Law Journal” 1996, 4.
- <http://deduhova.ru/statesman/pavel-karlovich-fon-rennenkampf/> (access: 15.09.2019)
- Hughes Ch.E., *War Powers Under the Constitution*, “Marquette Law Review” 1917, 2.
- Jałowicki M., *Na skraju imperium i inne wspomnienia*, Warszawa 2015.
- Johnson R., *A Monolithic Threat: The Anti-Sharia Movement and America’s Counter Subversive Tradition*, “Washington & Lee Journal of Civil Rights and Social Justice” 2012.
- Kagan R., *The return of History and the End of Dreams*, London 2008.
- Lin E., *Korematsu Continued...*, “Yale Law Journal” 2003, 112.

- Lo J.-Y., *Chinese Australians Are Not a Fifth Column*, "Foreign Policy" 31.05.2018, <https://foreignpolicy.com/2019/05/31/chinese-australians-are-not-a-fifth-column-china-ccp-australia-morrison-turnbull-espionage-foreign-interference/> (access: 10.08.2019).
- Loeffel R., *The Fifth Column in World War II, Suspected Subversives in the Pacific War and Australia*, Palgrave Macmillan 2015.
- Losada L.A., *The Fifth Column in the Peloponnesian War*, Mnemosyne 2018.
- Rohde A. (ed.), *The German Fifth Column in Poland*, Dale Street Books 2014.
- Sadat L.N., *On Legal Subterfuge and the So-Called "Lawfare" Debate*, "Case Western Reserve Journal of International Law" 2010–2011, 43.
- Serrano S.K., Minami D., *Korematsu v. United States: A "Constant Caution" in a Time of Crisis*, "Asian Law Journal" 2003, 10.
- Smith J., *Chinese Spy Story Stirs Australian Anxiety*, "Financial Times" 2.12.2019.
- Soutphommasane T., *Beware Fanning Flames of racism over "Silent Invasion"*, "The Sydney Morning Herald" 28.02.2018, <https://www.smh.com.au/national/beware-fanning-flames-of-racism-over-silent-invasion-fears-20180228-p4z261.html> (access: 18.08.2019).
- Tyler A.M., *Courts and the Executive in Wartime: A Comparative Study of American and British Approaches to the Internment of Citizens during World War II and Their Lessons for Today*, "California Law Review" 2019.
- Valis N., *Hemingway's The Fifth Column, Fifthcolumnism, and the Spanish Civil War*, "The Hemingway Review" 2008, 28.
- Wang Ch., *America's Obsession with Chinese Spying is Hurting Innocent People*, <https://thediplomat.com/2019/07/americas-obsession-with-chinese-spying-is-hurting-innocent-people/> (access: 15.07.2019).
- Waxman M.C., *The Power to Wage War Successfully*, "Columbia Law School, Scholarship Archive" 2017, 117.
- Weiwei Z. *The China wave. Rise of a Civilizational State*, World Century Publishing Corporation 2011.
- Yarbrough T.E., *Mr. Justice Black and His Critics*, Durham, NC 1988.

Court decisions

- Fred Korematsu v. United States 323 U.S. 214 (1944).
- Trump v. Hawaii, No. 17-965, 585 U.S. (2018), D.